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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~402~~. 224

RICHARD R. PARKINSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

FILED JANUARY 22, 1884.

SUPREME COURT OF THE UNITED STATES.

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1 DISTRICT OF NEVADA, *ss:*

In the United States circuit court for said district, at a term thereof begun and held at Carson City on the fifth day of November, A. D. 1883—Present, honorable Lorenzo Sawyer, circuit judge, and honorable G. M. Sabin, district judge—the following proceedings were had and entered of record, to wit:

RICHARD R. PARKINSON, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT in error.

In this cause it was this day announced by the court that the opinions of the judges were opposed; and the United States attorney being present, upon his motion it is ordered that the following certificate be entered of record and duly certified to the Supreme Court of the United States, viz:

Be it remembered that at the November term of the United States circuit court of the ninth circuit, for the district of Nevada, begun
2 and held at Carson City, in said district, on the first Monday of November, 1883, by honorable Lorenzo Sawyer, circuit judge of said circuit, and honorable Geo. M. Sabin, district judge of said district, on Tuesday, the 13th day of November, 1883, being a day of said term, the mandate of the Supreme Court of the United States was filed in said cause by Trenmore Coffin, United States attorney, dismissing this cause from said court upon the certificate of an opposition of opinion of the judges of this court upon questions arising upon the writ of error in said cause, from this court to the district court for said district of Nevada, on the ground that the Supreme Court had no jurisdiction of said cause upon said certificate of opposition of opinion for the reason that one of said judges of this court certifying to said certificate of opposition of opinion, honorable E. W. Hillyer, tried said cause as district judge, and was therefore, under the statutes of the United States, not authorized to take part in the decision in the circuit court on said writ of error to the dis-
3 trict court; said mandate commanding this court to take such further proceedings as according to right and justice and the laws of the United States ought to be had, the said certificate notwithstanding. And there having been a change in the judge of the said district court since said certificate of opposition of opinion by the decease of said honorable E. W. Hillyer and the appointment of honorable Geo. M. Sabin as his successor, and the question upon which said certificate of opposition of opinion being important and the authorities not uniform, and it appearing to the court that justice and right require a reargument of said question before a full bench of said circuit court as now organized, it was ordered that the submission of said writ of error for decision heretofore made be, and the same was, vacated and set aside; and it was further ordered that said writ of error be reargued before a full bench of the said circuit court, as now constituted and organized.

Afterwards, at said term, R. M. Clarke, esq., appearing for said
4 Parkinson, plaintiff in error, and Trenmore Coffin, esq., United States attorney, appearing for the defendant in error, by consent of counsel said cause was again submitted for the decision of the court

upon printed arguments on file in the case, and thereupon said cause was taken under advisement by said court, honorable Lorenzo Sawyer, circuit judge, and honorable Geo. M. Sabin, district judge, sitting in said cause.

Afterwards, the writ of error to the district court of said district of Nevada in the above-entitled cause, and the questions arising therein, having been duly submitted for consideration and decision, was duly considered by said court, consisting of said judges, upon the information in said cause, and the bill of exceptions therein, which information, as appears from the bill of exceptions in said cause, is in the words and figures following, to wit:

"Now comes Charles S. Varian, esq., the district attorney of the United States for the district of Nevada, who for the said United States in this behalf prosecuteth, and by leave of the court first had and obtained
5 gives the court here to understand that heretofore, to wit, on the seventh day of November, A. D. 1876, at the city of Carson, in the district of Nevada, and election for Representative from the State and district of Nevada, in the Congress of the United States of America, was regularly held and had in pursuance of the laws of Congress and said State; that at said time and place and said election, and prior thereto, one Richard R. Parkinson, late of the county of Ormsby and district aforesaid, gentleman, was a citizen of England and a subject of the Queen of Great Britain and Ireland, born in England of parents who, at the time of his birth, were citizens thereof and subjects of the Queen aforesaid, and that the said Richard R. Parkinson had never been made nor naturalized a citizen of the said United States, and had no lawful right to vote at said time or place, nor at the election aforesaid.

That at said time and place and at the election for Representative in Congress aforesaid, and while he had no lawful right to vote as aforesaid, he, the said Richard R. Parkinson, did unlawfully, fraudulently and
6 feloniously vote, contrary to form of the statute of the United States of America in such cases made and provided and against their peace and dignity.

And the said district attorney for the United States gives the court further to understand that heretofore, to wit, on the fifth day of November, A. D. 1878, at the city of Carson in the district aforesaid, another election for Representative for said district and State in the Congress aforesaid, was held and had regularly in pursuance of the laws of Congress and said State; that prior thereto, to wit, on the twelfth day of April, A. D. 1878, a registration of electors and voters for the election aforesaid was regularly held and had in pursuance of the laws of Congress and the State aforesaid at said city of Carson, and in the district aforesaid. That on said last-mentioned day, and at said place and registration, he, the said Richard R. Parkinson, while he was still an unnaturalized alien and citizen of England and subject of the Queen of Great Britain and Ireland, in manner and form as in the first count of this information set
7 out, and being then and there without lawful right to register as a voter at the election as aforesaid, did unlawfully, fraudulently, and feloniously register his name as an elector and voter qualified to vote at the election last aforesaid, with one Charles A. Witherell, esq., an officer of registration, then and there duly elected, appointed, qualified, and

acting under and in pursuanee of the laws of Congress and said State. All of which is against the peace and dignity of the United States of America, and against their statutes in such case made and provided.

Wherefore the district attorney prays the consideration of the court here in the premises, and that due process of law may be awarded against him, the said Richard R. Parkinson, in this behalf, to make him answer to the said United States touching and concerning the premises aforesaid.

CHARLES S. VARIAN,
U. S. District Attorney.

UNITED STATES OF AMERICA,
District of Nevada, ss:

8 Samuel C. Wright, chairman of the Republican county central committee of Ormsby County, Nevada, being first duly sworn, upon his oath says that he has heard read the foregoing information, and knows the contents thereof, that the same and every part thereof in manner and form as alleged is true."

S. C. WRIGHT.

Subscribed & sworn to before me this 16th day of December, A. D. 1878.

T. J. EDWARDS,
Com. U. S. Circuit Court, Dist. Nevada.

To which information there was a plea of not guilty. Upon the trial of the issues in said cause, as shown by the bill of exceptions, it appeared from the testimony that the plaintiff in error, on November 7, 1876, at the city of Carson, in the said district of Nevada, voted at an election held for Representative in Congress.

Under the laws of Nevada, other officers of the State of Nevada were voted for at the same time, and the said laws required that the names of all officers voted for, including a Representative in Congress, be
9 written or printed on the same ballot, and the only evidence that said plaintiff in error voted for a Representative in Congress was that he cast a ballot whereon the name of a Representative in Congress might by law be written, printed, or contained.

It also appeared that on the 6th day of November, 1878, an election for Representative for the district of Nevada in the Congress of the United States was held at Carson in pursuance of law; that on the 12th day of April, 1878, a registration of voters for said election was held at Carson, in said district, in pursuance of law, and that on that day said plaintiff in error registered his name in said Carson, in said district, as an elector and voter for said election.

It appeared from the testimony that the plaintiff in error was born in England, of English parents, who at the time of his birth were subjects of the Queen of Great Britain; that he came to California in 1850 from Australia, and that when he first arrived in the United States he was over twenty-one years of age.

10 A witness for the prosecution testified that plaintiff in error, Parkinson, told him that he, Parkinson, was in California before its admission into the Union, and that that made him a citizen.

Another witness for the prosecution testified that said Parkinson in answer to a question by him as to his citizenship, answered "You know us old stiffs that were in California as early as 1850 must be citizens." And

that in answer to a question why he did not produce his naturalization papers and thus put a stop to the proceedings against him, plaintiff in error, Parkinson, answered, "they have got to prove that I am not a citizen."

Another witness for the prosecution testified that said Parkinson told him that he, Parkinson, came to San Francisco in 1850, and was naturalized in 1850 or 1851, and that he had his papers in his pocket at the time of the conversation and could produce them."

Another witness testified that said plaintiff in error told him that he, plaintiff in error, "came to America in 1850, and was naturalized
11 in 1851 in San Francisco, California, and that there were papers in the custom-house in San Francisco that would show it."

These conversations were all had since the commencement of these proceedings.

The plaintiff in error testified on his own behalf, and after stating that he was born in England of parents who were at the time subjects of the Queen of Great Britain, and that he arrived in California, after he was of age, on April 3, 1850, from Australia, said "he knew he was not entitled to vote unless naturalized." He further testified that he resided in San Francisco from his arrival in 1850 till May, 1856, when he removed to Sierra County, California, and continued to reside in that county till 1863, when he went to the State of Nevada. The counsel of plaintiff in error then offered to prove by the plaintiff in error's own testimony that he, Parkinson, declared his intention to become a citizen of the United States; that for that purpose he went ashore the second day after his arrival
12 and swore allegiance to the Government of the United States; that afterwards, in August, 1855, he applied to be admitted a citizen in San Francisco, at a court situated on Clay street and the Plaza, on the corner of Clay and Kearney streets; that Thomas Hays, the county clerk and Mayor Van Ness, who are both dead, went with him as witnesses to get his papers; that they were sworn and testified; that upon the proofs thus made he received from the court a certificate of naturalization; that he afterwards lost it in 1856; and then to prove the contents the foregoing testimony was offered:

1. To show that plaintiff in error had been duly naturalized.

2. To show (both parties insisting and claiming that there is no record of the naturalization of plaintiff in error in any court of San Francisco) that he had good reason to believe, and did believe, even though the clerk neglected to make a record of the judgment, that he was duly naturalized and entitled to vote and to register, and that the acts complained of
13 were therefore performed in good faith, and without intent to violate the law.

The United States attorney objected on the ground that the evidence is incompetent for either purpose, the record of naturalization being the only competent evidence. The court sustained the objection, and plaintiff in error excepted.

The counsel for the United States, under objection and exception by said Parkinson, proved by way of rebuttal by the custodians of all the records of all the courts of record in San Francisco that the records of said courts for the year 1855 are perfect, as appears upon their face, and izaave not destroyed or lost, and that no record of Parkinson's nation can be found.

The foregoing is, in substance, all the evidence introduced relating to the citizenship or non-citizenship of the plaintiff in error, Parkinson.

The court then, among other things, charged the jury as follows:

"That in this criminal prosecution the burden of proof was on the prosecution to establish by legal evidence the truth of every material al-
14 legation in the information beyond a reasonable doubt. That there never came a time in a criminal case when, if it were submitted to the jury, they must not be able to say, upon a consideration of all the evidence for and against the defendant, that his guilt was established to their satisfaction to a moral certainty and beyond any reasonable doubt. That in this sense the burden of proof never shifted. That, however, when the prosecution had made prima facie proof of all the facts essential to constitute the crime charged, such as would justify the jury, if unexplained, in finding a verdict of guilty, it then became incumbent upon the defendant to explain and rebut this prima facie case so far, at least, as to raise a reasonable doubt as to the defendant's guilt."

Part A.—The court further charged as follows:

"That a criminal intent is generally an element of crime, but that every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. That when every act necessary to consti-
15 tute the crime was knowingly done, then the crime itself was knowingly committed; that when such acts were thus knowingly done the law supplied the criminal intent. That ignorance of a fact may sometimes be evidence of a want of criminal intent, but not ignorance of the law. That no belief, if the defendant had any such belief, however honest, that he had a right to vote, would excuse.

"That the laws of the United States prescribed the manner in which aliens could become citizens thereof; that the defendant was presumed to know these laws, and that he could in no other manner become a citizen so as to entitle him to vote; that any belief of the defendant that he became a citizen by reason of his residence in California at the time of its admission, if it existed, was therefore no excuse. That by his own confession on the witness-stand the defendant knew he not entitled to vote unless naturalized. That if he knew he was born in England of alien parents, and came to the United States an alien over twenty-
16 one years of age, and knew that he voted as alleged in the information, he must be presumed to have known that he was not a citizen of the United States, and therefore not qualified under the laws of Nevada to vote."

To all which charge in reference to knowledge defendant then and there duly excepted.

Part B.—The court further charged that "there was an entire absence in this case of any legal proof of the defendant's naturalization. That if he ever had been naturalized, he was bound to prove it, either by producing the judgment of a proper court adjudicating him a citizen, or a duly certified copy of such judgment."

To all of which charge, and separately to each proposition thereof, defendant then and there duly excepted.

Part C.—The court further charged that "when the prosecution had established the alienage of the defendant, that is to say, that he was born in England of parents who were aliens, and came to this country an alien

over twenty-one years of age, and the voting and registering by
17 him as charged, this was sufficient to cast the burden of showing his naturalization upon the defendant, United States citizenship being by the law of Nevada one of the qualifications of an elector. That in the absence of such proof, lying as it did peculiarly within the defendant's knowledge, the jury would be justified in presuming the defendant was not a citizen of the United States when he voted and when he registered, if satisfied from the evidence he was an alien and came to this country as he stated, after he was of age."

To which defendant then and there duly excepted.

Part D.—The court further charged the jury as follows: "That the prosecution was not obliged to show that the defendant had voted a ticket upon which the name of some candidate for Representative in Congress was actually written or printed at the time the ticket was voted, but that it was sufficient prima facie to prove that the defendant has cast a ballot whereon the name of such Representative might be printed, written
18 or contained. That the laws of Nevada required the name of a person to be voted for Representative in Congress to be printed or written on the same ticket or ballot with the names of the other candidates to be voted for, for State and county officers. That but one ticket could be voted, and that might be so folded as to prevent any one from knowing whether the person voting voted for all or any part of the persons for whom he might vote, and that when it was shown that the defendant had voted a ticket at such an election it was sufficient proof prima facie that he voted at an election for Representative in Congress, which was all the law required to be shown in the first instance."

To which charge and every part thereof defendant Parkinson, by his counsel, duly excepted.

Upon the hearing of said cause and upon the consideration thereof upon said hearing by said court and said judges, it occurred as a question:

1. Whether the evidence of said plaintiff in error, Parkinson,
19 to the effect that he had been naturalized and received a certificate thereof which he afterwards lost, together with the evidence of its contents, offered to be introduced by him and excluded by the court as hereinbefore set out, was admissible for the second purpose for which it was offered as herein stated, and whether the district court erred in rejecting said evidence, on which question the opinions of the judges were opposed.

2. It further occurred as a question on said hearing, whether that portion of the charge of the district court as hereinbefore set out and designated Part A, is correct in law, and whether the district court erred in giving to the jury that part of said charge so designated Part A, to the giving of which exception was duly taken by the plaintiff in error; on which question the opinions of the judges were opposed.

3. It further occurred as a question on said hearing, whether that portion of the charge of the district court as hereinbefore set out and designated Part B, is correct in law, and whether the said district court erred in giving to the jury that part of said charge so designated
20 Part B, and to the giving of which the plaintiff in error duly excepted; on which question, also, the opinions of the judges were opposed.

4. It further occurred on said hearing as a question, whether that portion of the charge of the district court hereinbefore set out and designated Part C, is correct in law, and whether the said district court erred in giving to the jury that part of said charge so designated Part C, and to the giving of which exception was duly taken by the plaintiff in error as stated; on which question, also, the opinions of the judges were opposed.

5. It further occurred as a question on said hearing, whether that portion of the charge of the district court hereinbefore set out and designated Part D, is correct in law, and whether the district court erred in giving to the jury that part of said charge so designated Part D, and to which exception was duly taken as stated by the plaintiff in error; on which question, also, the opinions of the judges were opposed.

21 Whereupon, on motion of the defendant in error, by Trenmore Coffin, its counsel, that the said several points on which the disagreement hath happened may, during the term, be stated under direction of the judges, and certified, under the seal of the court, to the Supreme Court to be finally decided:

It is ordered that the questions occurring in the foregoing state of the pleadings and the foregoing statement of facts, which is made under the direction of the judges, be entered of record and be certified by the clerk under the seal of the court, accord ing to request of the defendant in error, by Trenmore Coffin, its counsel, and the law in that case made and provided, to the Supreme Court of the United States at its next term for its determination thereof:

1. Whether the evidence offered by the plaintiff in error mentioned in the first point stated, upon which the judges were opposed, and rejected by the district court, was admissible for the said purpose for which it was
22 offered, and whether the district court erred in rejecting said evidence.

2. Whether that portion of the charge hereinbefore designated as Part A is correct in law, and whether the district court erred in giving said part of said charge to the jury as stated.

3. Whether that portion of the charge given by the district court to the jury, hereinbefore designated Part B, is correct in law, and whether the district court erred in giving the same to the jury as hereinbefore stated.

4. Whether that portion of the charge given to the jury by the district court, hereinbefore designated Part C, is correct in law, and whether the district court erred in giving the same to the jury as hereinbefore stated.

5. Whether that portion of the charge given to the jury by the district court, hereinbefore designated Part D, is correct in law, and whether
23 the district court erred in giving the same to the jury as hereinbefore stated.

Nov. 20, 1883.

LORENZO SAWYER,
Circuit Judge.
SABIN,
District Judge.

The above and foregoing is a full, true, and correct copy of the original

proceedings and order made and entered by said court on the 20th day of November, 1883.

Witness my hand and the seal of said circuit court this first day of December, A. D. 1883.

[SEAL.] T. J. EDWARDS, *Clerk.*

(Indorsement on cover:) No. 492. Richard R. Parkinson, plaintiff in error, vs. The United States. Nevada C. C. U. S. Filed 22d January, 1884.

121-281

APR 12 1887
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1886.

RICHARD R. PARKINSON,
Plaintiff in Error,
vs.
THE UNITED STATES.
} No. 227.

CERTIFICATE OF DIVISION IN OPINION FROM UNITED STATES CIRCUIT COURT, DISTRICT OF NEVADA.

Brief for the United States.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1880.

RICHARD R. PARKINSON,
Plaintiff in Error,
vs.
THE UNITED STATES.
No. 227.

CERTIFICATE OF DIVISION IN OPINION FROM UNITED STATES CIRCUIT COURT, DISTRICT OF NEVADA.

Brief for the United States.

This prosecution originated in the district court for the district of Nevada.

It is founded on an information containing two counts (R., pp. 2, 3).

THE FIRST COUNT charges that Parkinson, being a British subject, unlawfully voted at an election held at the city of Carson on the 7th November, 1876, for the purpose of electing a representative

from the State and district of Nevada to the Congress of the United States, in violation of law, the law violated being section 5511, Revised Statutes, which provides that—

> If at any election for Representative or Delegate in Congress any person * * * votes without having a lawful right to vote, * * * he shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution.

THE SECOND COUNT charges that Parkinson, on the 12th of April, 1878, at said city of Carson, being a British subject, unlawfully registered his name as an elector and voter qualified to vote at an election for a member of Congress thereafter to be held on the 5th November, 1878, in violation of law, the law violated being Section 5512, Revised Statutes, which provides that—

> If, at any registration of voters for an election for Representative or Delegate in the Congress of the United States, any person * * * fraudulently registers or fraudulently attempts to register, not having a lawful right so to do, * * * every such person shall be punishable as prescribed in the preceding section.

Parkinson was convicted and brought the record of the judgment of conviction to the circuit court, by writ of error, for review.

Upon the consideration of the case on the writ of error it is certified that the following questions arose:

1. Whether the evidence of said plaintiff in error, Parkinson, to the effect that he had been naturalized and received a certificate thereof which he afterwards lost, together with the evidence of its contents, offered to be introduced by him and excluded by the court as hereinbefore set out, was admissible for the *second* [said] purpose for which it was offered as herein stated, and whether the district court erred in rejecting said evidence, on which question the opinions of the judges were opposed.

2. It further occurred as a question on said hearing, whether that portion of the charge of the district court as hereinbefore set out and designated Part A is correct in law, and whether the district court erred in giving to the jury that part of said charge so designated Part A, to the giving of which exception was duly taken by the plaintiff in error; on which question the opinions of the judges were opposed.

3. It further occurred as a question on said hearing, whether that portion of the charge of the district court as hereinbefore set out and designated Part B is correct in law, and whether the said district court erred in giving to the jury that part of said charge so designated Part B, and to the giving of which the plaintiff in error duly excepted; on which question, also, the opinions of the judges were opposed.

4. It further occurred on said hearing as a question, whether that portion of the charge of the district court hereinbefore set out and designated Part C is correct in law, and whether the said district court erred in giving to the jury that part of said charge so designated Part C, and to the giving of which exception was duly taken by the plaintiff in error, as stated; on which question, also, the opinions of the judges were opposed.

5. It further occurred as a question on said hearing whether that portion of the charge of the district court hereinbefore set out and designated Part D is correct in law, and whether the district court erred in giving to the jury that part of said charge so designated Part D, and to which exception was duly taken as stated by the plaintiff in error; on which question also the opinions of the judges were opposed.

The questions thus arising the circuit court certified to this court in a somewhat different form, and as follows:

1. Whether the evidence offered by the plaintiff in error mentioned in the first point stated, upon which the judges were opposed, and rejected by the district court, was admissible for the said purpose for which it was offered, and whether the district court erred in rejecting said evidence.

2. Whether that portion of the charge hereinbefore designated as Part A is correct in law, and whether the district court erred in giving said part of said charge to the jury as stated.

3. Whether that portion of the charge given by the district court to the jury, hereinbefore designated Part B, is correct in law, and whether the district court erred in giving the same to the jury as hereinbefore stated.

4. Whether that portion of the charge given to the jury by the district court, hereinbefore designated Part C, is correct in law, and whether the district court erred in giving the same to the jury as hereinbefore stated.

5. Whether that portion of the charge given to the jury by the district court, hereinbefore desig-

nated Part D, is correct in law, and whether the district court erred in giving the same to the jury as hereinbefore stated.

Argument.

A QUESTION OF JURISDICTION.

The offenses of illegal voting and illegal registering charged in the information may each be punished by imprisonment for three years, and, therefore, by imprisonment in a penitentiary under section 5541, Revised Statutes, which provides as follows,

> In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose.

It is suggested, therefore, that both offenses fall within the cases *Ex parte* Wilson (114 U. S., 417), and Mackin and another *v.* The United

States (117 U. S., 348), and, as a consequence, that the district court had no jurisdiction to entertain such offenses as charged by information, or except on indictment or presentment by a grand jury.

The Questions Certified.

FIRST.

This question relates to the admissibility of the defendant's offer of evidence to show that he took all the steps necessary to naturalization, and was naturalized on the testimony of two witnesses, then dead, and received a certificate of naturalization, then lost.

Section 2165, Revised Statutes, provides that an alien may be admitted to become a citizen of the United States "in the following manner, *and not otherwise.*" It then goes on to provide that on application for naturalization the alien shall take an oath to support the Constitution of the United States, and of renunciation of his former allegiance, "*which proceedings shall be recorded by the clerk of the court.*"

It is, then, by the express command of the law that naturalization shall be by a recorded proceeding, "*and not otherwise.*"

But the defendant's offer of evidence was not accompanied by an offer to show that a record had ever been made of the alleged proceedings on his alleged application to be naturalized.

It was his duty to see that the alleged proceedings, so nearly concerning him, were recorded, according to law.

To have admitted the evidence would have violated the established rule, that evidence which from its very nature supposes evidence of a better and higher kind cannot be received until the absence of the primary and better evidence is satisfactorily accounted for. The mere offer of such inferior evidence without showing the non-producibility of the primary raises a violent presumption of fraud.

The question is set at rest by this court in Weatherhead's Lessee *v.* Baskerville (11 How., 329, 360), where it is laid down,———

> The rule in respect to judicial records is, that, before inferior evidence can be received of their con-

tents their existence and loss must be clearly accounted for. *It must be shown that there was such a record, that it has been lost or destroyed or is otherwise incapable of being produced,* or *that its mutilation from time or accident has made it illegible.* In this last, though not without the production of the original in the condition in which it may be; the inferior evidence to establish the existence of a judicial record must be *something officially connected with it, such as the journals of the court* or *some other entry, though short of the judgment or record, which shows that it has been judicially made.*

Also in Elliott *v.* Piersol (1 Pet., 328, 340), where it was sought to get the benefit of parol evidence that a *feme covert* had *in fact* acknowledged a certain deed in the way required by law, except that no proper record or official certificate of such acknowledgment had been made, this court held that such evidence could not take the place of that required by law, namely, the official certificate or record, saying,

What the law requires to be done and appear of record, can only be done and made to appear by the record itself, or an exemplification of the record. It is perfectly immaterial whether there be an acknowledgment or privy examination in fact, or not, *if*

there be no record made of the privy examination; for, by the express provisions of the law, *it is not the fact of privy examination merely, but the recording of the fact, which makes the deed effectual to pass the estate of a feme covert.*

SECOND.

The charge of the trial judge "that if the accused knew he was born in England of alien parents, and came to the United States an alien over twenty-one years of age, and knew that he voted as alleged in the information, he must be presumed to have known that he was not a citizen of the United States, and therefore not qualified under the laws of Nevada to vote," was correct upon reason and authority.

The same law has been repeatedly laid down in prosecuting for illegal voting, and, notably, by Mr. Justice Hunt, in the case of Susan B. Anthony (*vide* U. S. *v.* Anthony, 11 Blatch, 200). The authorities on this point are collected in 1 Whart. Crim. L., Section 81, Note 1.

The important case of U. S. *v.* Leathers (6 Sawyer, 1 and 28) is in entire accord with the

above authorities. To this may be added the Attorney-General *v.* Lockwood (9 M. & W., 378), and *Regina v.* Woodrow (15 *Ibidem*, 404).

It is true there is this difference between the offenses charged in the two counts, namely, that registration must be *fraudulent* to come within the law. But it is conceived that the authorities above cited bear us out in contending that a full knowledge of the facts supplies all the intent that the law requires to warrant a conviction. This would seem to be law, or the principle that ignorance of law does not excuse has ceased to have effect. In view of that principle, the accused, knowing that what he was doing was against law, must be held to have acted fraudulently in the sense of the statute.

THIRD.

This question arises on that part of the judge's charge which lays down "that there was an entire absence in this case of any legal proof of the defendant's naturalization. That if he ever had been naturalized he was bound to prove it,

either by producing the judgment of a proper court adjudicating him, or a duly certified copy of such judgment."

It is hardly necessary to do more in support of this part of the charge than refer to what has been said already with reference to the first question.

FOURTH.

The judge charged that,

When the prosecution had established the alienage of the defendant, that is to say, that he was born in England of parents who were aliens, and came to this country an alien over twenty-one years of age, and the voting and registering by him as charged, this was sufficient to cast the burden of showing his naturalization upon the defendant, United States citizenship being by the law of Nevada one of the qualifications of an elector. That in the absence of such proof, lying as it did peculiarly within the defendant's knowledge, the jury would be justified in presuming the defendant was not a citizen of the United States when he voted and when he registered, if satisfied from the evidence he was an alien and came to this country as he stated, after he was of age.

If this was not a correct exposition of the law, then it follows that the case of the prosecution could not have been complete without evidence to establish that there was nothing in the records of any Federal or State court having jurisdiction in naturalization to show that the accused had even been naturalized. It is difficult to conceive of the possibility of convictions under a law so applied.

The prosecution having shown that the accused was an alien at a time prior to the date of the information, the presumption was that his alienage continued until he showed to the contrary.

No case could be stronger for the application of the rule laid down by Mr. Greenleaf, that "where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party" (1 Greenl. Ev., § 79 and cases cited). See the striking remarks to the same effect of Mr. Justice Bayley in the King *v.* Turner (5 M. & S., 211).

FIVE.

This question arises upon that part of the judge's instruction which is in these words:

> That the prosecution was not obliged to show that the defendant had voted a ticket upon which the name of some candidate for Representative in Congress was actually written or printed at the time the ticket was voted, but that it was sufficient *prima facie* to prove that the defendant has cast a ballot whereon the name of such Representative might be printed, written or contained. That the laws of Nevada required the name of a person to be voted for Representative in Congress to be printed or written on the same ticket or ballot with the names of the other candidates to be voted for, for State and county officers. That but one ticket could be voted, and that might be so folded as to prevent any one from knowing whether the person voting voted for all or any part of the persons for whom he might vote, and that when it was shown that the defendant had voted a ticket at such an election it was sufficient proof *prima facie* that he voted at an election for Representative in Congress, which was all the law required to be shown in the first instance.

The question presented by this part of the court's charge is of great weight, and seems to

be no less than this, namely, whether the impossibility of proving the contents of the ballot cast by the accused, owing to the veil of secresy the law throws around it, authorized the presumption that the accused violated the law by voting for a Representative in Congress from the simple fact that he voted.

The court, it would seem, proceeded on the ground that it was a necessity in prosecutions under section 5511 that a presumption of this sort should be raised in order to prevent the statute from becoming a dead letter in cases where lawful evidence of the contents of the ballot cannot be obtained.

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